LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.
FILED
MAR 24 1958
JOHN T. FEY, Clerk

No. 817

In the Supreme Court of the United States

OCTOBER TERM, 1957

C. T. LOO, TRUSTEE IN DISSOLUTION FOR THE CREDITORS AND STOCKHOLDERS OF C. & M. McCARTHY, LTD., A DISSOLVED CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
[illegible],
[illegible],
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Argument	4
Conclusion	8
Appendix	9

CITATIONS

Cases:

Burnet v. *Lexington Ice & Coal Co.*, 62 F. 2d 906	7
Cold Metal Process Co. v. *Commissioner*, 247 F. 2d 864	4–5
Commissioner v. *Henry Hess Co.*, 210 F. 2d 553	5
Commissioner v. *South Texas Lumber Co.*, 333 U. S. 496	6
First Nat. Bank of Greeley, Colo. v. *United States*, 86 F. 2d 938	6, 7
Gensinger v. *Commissioner*, 208 F. 2d 576	6, 7
Hellebush v. *Commissioner*, 65 F. 2d 902	7
Howell Turpentine Co. v. *Commissioner*, 162 F. 2d 319	5
Lyeth v. *Hoey*, 305 U. S. 188	6
National Lead Co. v. *United States*, 252 U. S. 140	6
Northwest Utilities Securities Corp. v. *Helvering*, 67 F. 2d 619	7
Old Colony R. Co. v. *Commissioner*, 284 U. S. 552	6
Putnam, Estate of v. *Commissioner*, 324 U. S. 393	6
Steinberger v. *United States*, 81 F. 2d 1008	7
Taylor Oil & Gas Co. v. *Commissioner*, 47 F. 2d 108, certiorari denied, 283 U. S. 862	7
Tazewell Electric Light & Power Co. v. *Strother*, 84 F. 2d 327	7
Ungar, J., Inc. v. *Commissioner*, 244 F. 2d 90	6
United States v. *Cumberland Public Service Co.*, 338 U. S. 451	6
United States v. *Pelzer*, 312 U. S. 399	6
Whitney Realty Co. v. *Commissioner*, 80 F. 2d 429, certiorari denied, 298 U. S. 668	7

Statutes:

Internal Revenue Code of 1939: Page
Sec. 22 (a) (26 U. S. C. 1952 ed., Sec. 22 (a)) ---- 6, 9
Sec. 52 (a) (26 U. S. C. 1952 ed., Sec. 52 (a)) ---- 7, 9

Miscellaneous:

Treasury Regulations 111:
Sec. 29.22 (a)–20 ---- 6, 7, 10
Sec. 29.52–2 ---- 7, 10

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 817

C. T. LOO, TRUSTEE IN DISSOLUTION FOR THE CREDITORS AND STOCKHOLDERS OF C. & M. McCARTHY, LTD., A DISSOLVED CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (Pet. xvii–xxiii) is reported at 248 F. 2d 765.

JURISDICTION

The judgment of the Court of Appeals was entered on October 10, 1957. (Pet. xxiv.) On January 7, 1958, by order of Mr. Justice Douglas (Pet. xxv), the time within which to petition for certiorari was extended to and including March 8, 1958. The peti-

tion was filed on February 28, 1958. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether the court below erred in holding that a sale of property by petitioner as trustee in dissolution of a Hawaiian corporation is to be treated for tax purposes as if made by the corporation even though under Hawaiian law the corporation had ceased to exist prior to the sale.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statutes and Regulations are set forth in the Appendix, *infra*, pp. 9–11.

STATEMENT

The facts were all stipulated and may be summarized as follows:

C. & M. McCarthy, Ltd., was a corporation organized under the laws of Hawaii. It owned and operated two properties located in Honolulu known as the Donna Hotel and the Waikiki Apartments. (R. 31.)

In October 1944, several individuals (including petitioner C. T. Loo), who were interested in acquiring the Donna Hotel, made an offer to the corporation to purchase the hotel for $325,000. The offer was rejected by the corporation. However, the then stockholders of the corporation offered to sell to the group all the outstanding capital stock of the corporation for $400,000. This offer by the stockholders was accepted after the prospective purchasers had been assured by real estate brokers that the Waikiki Apartments could be sold for $75,000. (R. 31.) The

sale of the stock was completed on January 23, 1945, and on the same day the new stockholders became the directors and officers of the corporation. (R. 25.) Also, on the same day (January 23, 1945), the new stockholders voted to dissolve the corporation, in the manner provided by law, as of the close of business on February 15, 1945, and to request the Treasurer of the Territory of Hawaii to appoint petitioner trustee in dissolution for the creditors and stockholders of the corporation. The petition for dissolution was thereafter filed with the Treasurer of the Territory of Hawaii and on February 16, 1945, the Treasurer issued his decree dissolving the corporation, effective February 15, 1945, and appointing petitioner trustee in dissolution for the creditors and stockholders of the dissolved corporation. (R. 31–32.)

After dissolution, the property of the corporation was in the possession and control of petitioner. (R. 32.) As trustee in dissolution, he operated the Donna Hotel from the date of his appointment until August 31, 1945, when the hotel was transferred to the stockholders. (R. 26.) In the meantime, on February 19, 1945, he sold the Waikiki Apartments, which had an adjusted basis to the corporation of $20,849.30 (R. 32), to a third party for $75,000 (R. 25).

As trustee in dissolution, petitioner filed a final income tax return for the corporation covering the period from January 1 through August 31, 1945. The gain from the sale of the Waikiki Apartments was not reported in the return. Upon audit of the return, the Commissioner included the gain from the sale in the corporation's taxable income and made a

deficiency assessment of capital-gain tax in the amount of $13,173.20. As trustee in dissolution of the corporation, petitioner paid the deficiency, filed a claim for refund, and subsequently instituted suit for refund. (R. 33.)

The District Court allowed recovery on the ground that, because under Hawaiian law the existence of a corporation ceases for all purposes on the date of dissolution, petitioner, in selling the Waikiki Apartments as a trustee in dissolution, was acting for the creditors and stockholders of the corporation, rather than for the corporation. (R. 35–36.) The Court of Appeals reversed, holding that, although the corporation's existence may have terminated under Hawaiian law, the case is controlled by valid Treasury Regulations under which sales of property made by a trustee in liquidation are to be treated as if made by the corporation. (Pet. App. xvii–xxiii.)

ARGUMENT

1. Petitioner is in error in asserting (Pet. 6–8) that the decision below is in conflict with the decision of the Sixth Circuit in *Cold Metal Process Co.* v. *Commissioner*, 247 F. 2d 864, for that case did not involve a trustee in liquidation.

Unlike the petitioner here, the trustee in the *Cold Metal* case was the trustee of an *inter vivos* trust which received the assets of the corporation upon its dissolution and liquidation by virtue of the fact that it had purchased the stock of the other stockholders

and had become the sole stockholder of the corporation. Thus, the facts were such that, as the Sixth Circuit expressly stated in its opinion (p. 871), the Tax Court had rejected the Commissioner's contention that the trustee was a receiver or trustee in liquidation and the Commissioner did not press that contention on appeal. Instead, the Commissioner argued that the liquidating distribution of corporate assets to the trustee, as an independent party and the sole stockholder of the corporation, was in part an assignment of the corporation's income which should be taxed to the corporation in 1949 when the income was released. The Sixth Circuit held, *inter alia,* that the corporation was not in existence so as to be taxed in 1949, but that was because the corporation had already completely liquidated, having distributed all of its assets to its sole stockholder, and because the corporation's own limited activities subsequent to dissolution and liquidation, consisting solely of being a party to suits for the benefit of its stockholder, were not deemed sufficient to continue the corporation's existence. A transfer of corporate assets to the stockholders, or to the sole stockholder as in the *Cold Metal* case, ordinarily results of course in different tax consequences from liquidation by a receiver or trustee.[1]

[1] The other authorities cited by petitioner, including *Howell Turpentine Co.* v. *Commissioner*, 162 F. 2d 319 (C. A. 5th), and *Commissioner* v. *Henry Hess Co.*, 210 F. 2d 553 (C. A. 9th), also involved the transfer of the corporation's property to stockholders in liquidation.

See, *e. g., United States* v. *Cumberland Public Service Co.*, 338 U. S. 451; *Gensinger* v. *Commissioner*, 208 F. 2d 576 (C. A. 9th); *J. Ungar, Inc.* v. *Commissioner*, 244 F. 2d 90 (C. A. 2d); *First Nat. Bank of Greeley, Colo.* v. *United States*, 86 F. 2d 938 (C. A. 10th).

2. Contrary to petitioner's contention (Pet. 9–11), this case does not present an important question requiring settlement by this Court.

Petitioner is here seeking to draw a distinction, strictly on the basis of local law, between a corporation whose existence terminates upon dissolution and a corporation which remains in existence after dissolution for the limited purpose of winding up its affairs. Section 29.22 (a)–20 of Treasury Regulations 111 (Appendix, *infra*, p. 10), on which the court below relied, has been in effect since 1918, is a reasonable interpretation and application of Section 22 (a) of the 1939 Code (Appendix, *infra*, p. 9), and accordingly has the force and effect of law. See *National Lead Co.* v. *United States*, 252 U. S. 140; *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552; *Commissioner* v. *South Texas Lumber Co.*, 333 U. S. 496. This Court has repeatedly held that in applying the revenue statutes "state law may control only when the federal taxing act by express language or necessary implication makes its operation dependent upon state law". *Lyeth* v. *Hoey*, 305 U. S. 188, 194; *United States* v. *Pelzer*, 312 U. S. 399; *Estate of Putnam* v. *Commissioner*, 324 U. S. 393. Neither expressly nor by implication can this regulation be said to depend

for its application upon the refinements of state law. The regulation provides that, where corporate dissolution is effected through a receiver or trustee, "the corporate existence is continued for the purpose of liquidating" and any sales of property by a receiver or trustee in dissolution "are to be treated *as if* made by the corporation." (Italics supplied.)[1] The courts have for years consistently held, on the basis of the particular regulation then in force and without specific regard to state law, that the income derived from corporate assets in the course of liquidation by a receiver or trustee in dissolution is taxable to the corporation. See *First Nat. Bank of Greeley, Colo.* v. *United States, supra; Gensinger* v. *Commissioner, supra; Steinberger* v. *United States,* 81 F. 2d 1008 (C. A. 9th); *Northwest Utilities Securities Corp.* v. *Helvering,* 67 F. 2d 619 (C. A. 8th); *Whitney Realty Co.* v. *Commissioner,* 80 F. 2d 429 (C. A. 6th), certiorari denied, 298 U. S. 668; *Hellebush* v. *Commissioner,* 65 F. 2d 902 (C. A. 6th); *Taylor Oil & Gas Co.* v. *Commissioner,* 47 F. 2d 108 (C. A. 5th), certiorari denied, 283 U. S. 862; *Tazewell Electric Light & Power Co.* v. *Strother,* 84 F. 2d 327 (C. A. 4th); *Burnet* v. *Lexington Ice & Coal Co.,* 62 F. 2d 906 (C. A. 4th).

[1] The trustee or receiver in dissolution is required by Section 52 (a) of the Internal Revenue Code of 1939 and Section 29.52-2 of the Treasury Regulations promulgated thereunder (Appendix, *infra*, pp. 9–11) to file a corporate return covering the period of dissolution or liquidation.

CONCLUSION

No conflict of decisions or important question is involved. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
MELVA M. GRANEY,
JOHN J. MCGARVEY,
Attorneys.

MARCH 1958.

APPENDIX

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 22.)

SEC. 52. CORPORATION RETURNS.

(a) *Requirement.*—Every corporation subject to taxation under this chapter shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this chapter and such other information for the purpose of carrying out the provisions of this chapter as the Commissioner with the approval of the Secretary may by regulations prescribe. * * * In cases where receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations, such receivers, trustees, or assignees shall make returns for such corporations in the same manner and form as corporations are required to make returns. Any tax due on the basis of such returns made by receivers, trustees, or assignees shall be collected in the same manner as if collected from the corporations of whose

business or property they have custody and control.

* * * * *

(26 U. S. C. 1952 ed., Sec. 52.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.22 (a)–20. *Gross Income of Corporation in Liquidation.*—When a corporation is dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes. (See sections 274 and 298.) Any sales of property by them are to be treated as if made by the corporation for the purpose of ascertaining the gain or loss. No gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation, however they may have appreciated or depreciated in value since their acquisition. But see section 44 (d) and section 29.44–5. (See further section 29.52–2.)

SEC. 29.52–2. *Returns by Receivers.*—Receivers, trustees in dissolution, trustees in bankruptcy, and assignees, operating the property or business of corporations, must make returns of income for such corporations. If a receiver has full custody of and control over the business or property of a corporation, he shall be deemed to be operating such business or property within the meaning of section 52, whether he is engaged in carrying on the business for which the corporation was organized or only in marshaling, selling, and disposing of its assets for purposes of liquidation. Notwithstanding that the powers and functions of a corporation are suspended and that the property and business are for the time being in the custody of the receiver,

trustee, or assignee, subject to the order of the court, such receiver, trustee, or assignee stands in the place of the corporate officers and is required to perform all the duties and assume all the liabilities which would devolve upon the officers of the corporation were they in control. (See sections 274 and 298 and sections 29.274–1 and 29.274–2.) A receiver in charge of only part of the property of a corporation, however, as, for example, a receiver in mortgage foreclosure proceedings involving merely a small portion of its property, need not make a return of income.

U. S. GOVERNMENT PRINTING OFFICE 1958